IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

UNITED STATES OF AMERICA, Plaintiff,	)	
v.	)	Civil Action No.
SIDNEY MATHIS, et al., Defendants.	)	

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR AN IMMEDIATE ORDER IN AID OF ACCESS

I. INTRODUCTION

Plaintiff, United States of America, moves this Court to issue an Order, pursuant to section 104(e)(5) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), 42 U.S.C. § 9604(e)(5), as amended by the Superfund Amendments and Reauthorization Act ("SARA"), Pub. L. No. 99-499, 100 Stat. 1613 (October 17, 1986), granting the United States Environmental Protection Agency ("EPA") and its authorized representatives, including the Velsicol Chemical Corporation ("Velsicol") and Memphis Environmental Center, Inc. ("MEC"), access to the property owned by Defendants in Walker County, Georgia, for the purpose of conducting a response action, including a Remedial Investigation and Feasibility Study and any subsequent remedial measures determined by EPA to be necessary to protect human health or the environment. It is anticipated that the response action necessary on Defendants' property will

include the excavation of drums and contaminated soil. Access to Defendants' property is authorized because EPA has determined that a release or threatened release of hazardous substances may have occurred on property owned by Defendants and/or on property adjacent to Defendants' property.

II. STATEMENT OF FACTS

Defendants' property is part of a National Priorities List ("NPL") site known as the South Marble Top Road Landfill Superfund Site (the "Site"). (See, Exhibit 1, Affidavit of Pam Brown, containing property description and map). The NPL, promulgated at 40 C.F.R. Part 300, App. B, identifies those facilities nationwide at which releases or threatened releases of hazardous substances present the greatest risks of danger to the public health, welfare, or the environment. 42 U.S.C. § 9605(a)(8). The Site was operated as the Mathis Brothers Landfill (a/k/a the South Marble Top Road Landfill) by Defendants Sidney Mathis and Mose Mathis from 1974 to 1983. EPA has estimated that over 8,000 drums of chemical waste were disposed of at the South Marble Top Road Landfill and other disposal sites operated by these Defendants. The Site has essentially been inactive since 1983.

EPA and Velsicol entered into an Administrative Order on Consent in November 1988, in which Velsicol agreed to perform the Remedial Investigation and Feasibility Study ("RI/FS").[1] (Exhibit

[1] An RI/FS is a study conducted or overseen by EPA to characterize the nature and extent of contamination at a site and (continued...)

2). Despite the requests of EPA, Defendants Sidney Mathis and Mose Mathis refused to participate in the RI/FS.

Following several site investigations, EPA made the following findings of fact and conclusions of law in the Administrative Order by Consent:

1. The South Marble Top Road Landfill Site is a five (5) acre parcel of land, approximately one thousand (1000) feet east of Marble Top Road and one-half mile south of State Highway 136, in Walker County, Georgia.

2. The Respondent is a generator of certain waste substances present at the site.

3. The site was proposed for inclusion in January 1987 to the National Priorities List as defined in Section 105 of CERCLA, 42 U.S.C. Section 9605.[2]

4. Velsicol disposed of drums containing "Dicamba By-Products" and benzonitrile waste at the South Marble Top Road Landfill Site.

5. The site covers approximately five (5) acres. An exposed trench is on the southwest quadrant of the site. There are two areas that are void of vegetation and parallel each other for about one hundred (100) feet. Based on prior operations and the FIT Report EPA suspects that these areas are former disposal trenches. EPA representatives collected and analyzed soil samples taken from the suspected disposal trenches and found the presence of 1,4-dichlorobenzene, 2-chlorophenol, phenol, and 4-chloro-methylphenol, all of which are associated with dicamba and benzonitrile waste.

6. The Site is a "facility" as defined in Section 101(9) of CERCLA, 42 U.S.C. §9601(9).

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[1](...continued)
to determine the feasibility of remedial alternatives proposed for clean-up. See 40 C.F.R. § 300.68(d).

[2] The Site was proposed for listing on the NPL on January 22, 1987. 52 Fed. Reg. 2492. After the close of the public comment period, the Site was listed on the National Priorities List. The final rule was promulgated on March 31, 1989. 54 Fed. Reg. 13296, 13316.

7. Respondent is a "person" as defined by Section 101(21) of CERCLA, 42 U.S.C. §9601(21).

8. Respondent is a responsible party under Section 107(a)(3) of CERCLA, 42 U.S.C. §9607(a)(3).

9. Dicamba and benzonitrile are "hazardous substances" as defined in Section 101(14) of CERCLA, 42 U.S.C. §9601(14) and "pollutants or contaminants" as defined in Section 101(33) of CERCLA, 42 U.S.C. §9601(33).

10. Hazardous substances and pollutants or contaminants, as defined in Section 101(14) and 101(33) of CERCLA, have entered the environment at the Site through disposal activities and are currently present at the Site.

11. The past, present, or potential migration of hazardous substances from the Site constitutes an actual or threatened "release" as defined in Section 101(22) of CERCLA, 42 U.S.C. §9601(22).

(Administrative Order by Consent, Exhibit 2, pp. 2 - 3).

EPA's potentially responsible party (PRP) search indicated that Defendants Sidney Mathis and Mose Mathis were former owners of the Site and that Luther Hegwood was the current owner. Velsicol performed a title search to determine if this information was correct in order to obtain access agreements to perform the RI/FS. The title search revealed that the Site is not owned by Luther Hegwood but is comprised of several parcels of property with different owners. One of the parcels of property is jointly owned by the Defendants Sidney Mathis and Mose Mathis. A second parcel was owned by John L. Mathis, now deceased. In his will, John L. Mathis named Defendant Sidney Mathis as executor and bequeathed this property in equal shares to his heirs, the named Defendants. Only the Defendants have refused to grant access to Velsicol in order to perform the

RI/FS. The owners of the other parcels of property comprising the Site have consented to entry.

On March 15 and 16, 1989, MEC, Velsicol's contractor, sent certified letters to the Defendants Sidney Mathis and Mose Mathis explaining the necessity of access and requesting that they sign and return the attached access agreements by March 27, 1989. (Exhibit 3). The agreements were not returned. On March 28, 1989, MEC again wrote to these Defendants and stated that unless the signed agreements were returned by April 7, 1989, MEC would assume that they were refusing to permit access. (Exhibit 4). Defendant Sidney Mathis responded to MEC's request on April 3, 1989, by stating that he had been illegally evicted from the first parcel of property, jointly owned by him and Defendant Mose Mathis. With regard to the second parcel of property, he stated that it "d[id] not have waste on it" and MEC could take "whatever steps necessary to enter on the property." (Exhibit 5). MEC responded to Defendant Sidney Mathis on April 14, 1989, explaining that, based on MEC's review of the Walker County probate court and tax assessor's files, the first parcel of property to which MEC sought access was not the same piece of property which had been the subject of a dispute between Defendants and Luther Hegwood. MEC requested the production of any documents showing that the property was not owned by Defendants or was the subject of a dispute. MEC again requested that the access agreement be signed and returned unless the Defendant could support his statement that he had been evicted

from the property. With respect to the second parcel of property, MEC explained that the extent of contamination at the site could not be determined before the site study was conducted. MEC also explained that it was necessary for the Defendants to provide written consent before MEC could enter the property and again requested that the access agreements be signed and returned. (Exhibit 6). No agreements were forthcoming.

On May 3, 1989, EPA designated Velsicol and its contractors and agents as EPA's authorized representatives pursuant to Section 104(e)(1) and (3) of CERCLA, 42 U.S.C. § 9604(e)(1) and (3). (Exhibit 7). On the same day, EPA sent letters to the Defendants Sidney Mathis and Mose Mathis explaining that EPA had designated Velsicol and MEC as its authorized representatives and requesting that Defendants allow MEC onto their property to perform the necessary response actions. EPA gave Defendants ten (10) days to respond and advised the Defendants that if they did not authorize access, EPA would seek a court order directing them to permit access. (Exhibit 8). After these letters were sent, EPA learned that although Defendant Sidney Mathis had been named as executor of the estate of John L. Mathis, he had not taken his oath of office. Therefore, on August 11, 1989, MEC sent letters to each of the heirs who had not previously received individual requests for access, requesting that they consent to access. (Exhibit 9). On August 18, 1989, Defendant Ida Lee Mathis Palmer responded, stating that she could not sign the access agreement.

(Exhibit 10.) To date, none of the Defendants has authorized access.

III. STATUTORY OVERVIEW

A. Access Authority

CERCLA was enacted in 1980 to afford the government a broad array of powers to clean up hazardous waste disposal sites. Among those powers is the authority granted under sections 104(a) and (b) of CERCLA, 42 U.S.C. § 9604(a) and (b), to use "Superfund" monies[3] to investigate and clean up hazardous waste sites and the concomitant authority under section 104(e) of CERCLA, 42 U.S.C. § 9604(e), to enter hazardous waste sites for those same purposes. The broad entry authority conferred on EPA is an integral and necessary part of the remedial program established by CERCLA. If the owners of property affected by contamination from contaminated sites could deny EPA access, EPA would be unable to carry out its statutory mandate under CERCLA to clean up sites contaminated by hazardous substances which may pose risks of harm to human health and the environment. See Dedham Water Co. v. Cumberland Farms Dairy, Inc., 805 F.2d 1074, 1081 (1st Cir. 1986).

In the 1986 amendments to CERCLA (SARA), Congress "clarifie[d] and strengthen[ed]" the entry authorities in Section

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[3] The Hazardous Substance Superfund, formerly the Hazardous Substance Response Trust Fund, has been created by CERCLA through a tax on the petrochemical industry and by general appropriations. Fund monies used to investigate and remedy hazardous waste sites are returned to the Fund through cost-recovery actions against the parties responsible for the sites.

104(e) out of a concern that EPA investigations and clean-ups were being impeded by challenges to EPA's access authority. See H. Rep. No. 99-253, 99th Cong., 1st Sess. 70 - 71 (1985). Congress amended section 104(e) to clarify: (1) the grounds upon which entry can be granted; (2) the purposes for which entry may be sought; and (3) the places or properties which may be entered. See Section 104(m) of SARA, Pub. L. No. 99-499, 100 Stat. 1613, 1621-24 (1986) (codified at 42 U.S.C. § 9604(e)). Further, Congress strengthened Section 104(e) by codifying enforcement procedures for those instances when access is not provided on a voluntary basis. 42 U.S.C. § 9604(e)(5).

Under Section 104(e), there are three elements which trigger EPA's entry authority: (1) EPA must have a reasonable basis to believe there may be a release or threat of release of hazardous substances into the environment at the site; (2) the purpose of EPA's entry must be to determine the need for a response, to choose or take any response action, or to otherwise enforce the provisions of CERCLA; and (3) the property for which access is sought must fall within one of the categories enumerated in 42 U.S.C. § 9604(e)(3) or must be adjacent to such property within the meaning of § 9604(e)(1). 42 U.S.C. § 9604(e)(1). Section 104(e) provides that, if consent to entry is denied, EPA may either issue an administrative order for access or proceed

directly to federal district court to enforce its access authority. 42 U.S.C. § 9604(e)(5).[4]

Courts considering Section 104(e) of CERCLA have consistently upheld the access authority of EPA and its designated representatives to take response actions. See United States v. Dickerson, 660 F.Supp 227 (M.D. Ga.), aff'd. 834 F.2d

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[4] Section 104(e)(5) of CERCLA states as follows:

(5) Compliance Orders.--

(A) Issuance.--If consent is not granted regarding any request made by an officer, employee, or representative under paragraph (2), (3), or (4), the President may issue an order directing compliance with the request. The order may be issued after such notice and opportunity for consultation as is reasonably appropriate under the circumstances.

(B) Compliance.--The President may ask the Attorney General to commence a civil action to compel compliance with a request or order referred to in subparagraph (A). Where there is a reasonable basis to believe there may be a release or threat of a release of a hazardous substance or pollutant or contaminant, the court shall take the following actions:

(i) In the case of interference with entry or inspection, the court shall enjoin such interference or direct compliance with orders to prohibit interference with entry or inspection unless under the circumstances of the case the demand for entry or inspection is arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law.

(ii) In the case of information or document requests or orders, the court shall enjoin interference with such information or document requests or orders or direct compliance with the requests or orders to provide such information or documents unless under the circumstances of the case the demand for information or documents is arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law.

974 (11th Cir. 1987) (access granted to EPA for purposes of investigating, monitoring, sampling and conducting remedial action at drum storage site); United States v. Fisher, 864 F.2d 434 (7th Cir. 1988) (access granted for site investigation); United States v. Stanley Sondey, 88-2955 HAA (D.N.J. August 10, 1988) (order granting access to EPA and its representatives to determine the need for, choose and conduct response activities); United States v. Pepper's Steel and Alloy, Inc., No. 83-1717-CIV-EPS (S.D.Fla. October 10, 1986) (access granted for necessary sampling and maintenance); United States v. Standard Equipment, Inc., 13 Chem. Waste. Lit. Rptr. 261, 263 (W.D. Wash. Nov. 3, 1986) (access granted for soil testing and sampling at site adjacent to CERCLA site); United States v. Charles George Trucking Co., 682 F. Supp. 1260, 1274 (D. Mass. 1988) (access granted to the site and adjacent properties to construct the remedy); United States v. Iron Mountain Mines, Inc., 28 Envt. Rep. Cas. 1454 (BNA) (E.D. Cal. Sept. 18, 1987) (EPA's right to access to conduct remedial action enforced); United States v. Long, 687 F. Supp. 343 (S.D. Ohio 1987) (EPA's right of access to conduct sampling enforced).[5]

B. Standard and Scope of Review

Section 104(e)(5)(B) directs courts to enforce EPA access requests or orders where the standard set forth in section 104(e)(1) is met, i.e., where "there is a reasonable basis to

[5] All cases not reported in West's federal reporters are attached hereto as Exhibit 11.

believe there may be a release or threat of a release of a hazardous substance or pollutant or contaminant." CERCLA expressly provides that unless an EPA determination on an access matter is "arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law," a court must sustain EPA's determination. 42 U.S.C. § 9604(e)(5)(B)(i) (quoted in full at footnote 3). Thus, the court's role is limited to determining whether EPA's determinations on access matters are arbitrary and capricious or an abuse of discretion. Section 104(e)(5)(B)(i) directs the court to enjoin any interference with EPA's access in accordance with EPA's request unless the Agency's determinations are deemed "arbitrary and capricious."

Limiting judicial review of EPA's access determinations serves to further CERCLA's fundamental purpose of expeditiously cleaning up sites contaminated by hazardous substances. As the Second Circuit has observed in Wagner Seed Co. v. Daggett, 800 F.2d 310 (2d Cir. 1986):

> To introduce the delay of court proceedings at the outset of a cleanup would conflict with the strong congressional policy that directs cleanups to occur prior to a final determination of the parties' rights and liabilities under CERCLA.

Id. at 315.

If judicial review in access proceedings under Section 104 of CERCLA were not limited, and property owners were thereby able to delay entry through protracted judicial proceedings, the broad access rights Congress gave EPA would be significantly undercut and EPA's ability to conduct cleanups expeditiously would be

seriously compromised. By narrowly circumscribing judicial review, prompt access to the site and a prompt cleanup is ensured.

The legislative history underlying Section 104(e) underscores that judicial review of EPA's access determinations is to be narrowly circumscribed. Representative Glickman, who spoke authoritatively on this issue in the House,[6] declared:

> [R]eview under section 104(e), relating to access, does not open up the response itself to judicial review. Rather, only [EPA's] reasonable belief that there ha[s] been a release or threatened release is subject to review.

132 Cong. Rec. H9582 (Oct. 8, 1986) (Statement of Rep. Glickman). Senator Thurmond, Chairman of the Senate Judiciary Committee, similarly stated that

> [i]n actions to compel access, the court may only review whether the Agency's conclusion that there is a release or threatened release of hazardous substances is arbitrary or capricious. The court may not review the response action to be performed.

132 Cong. Rec. S14928-29 (Oct. 3, 1986) (Statement of Sen. Thurmond).

The courts have given full effect to this congressional intent. See, e.g., Dickerson v. Administrator, EPA, 834 F.2d 974, 977 (11th Cir. 1987) ("Courts must enjoin any interference

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[6] Rep. Glickman is described by both majority and minority managers of the conference reports on SARA as the leading spokesman for the House in the Conference Committee on the topic of judicial review. 132 Cong. Rec. H9563, 9582 (Oct. 8, 1986) (Statement of Rep. Dingell; Statement of Rep. Lent).

with the EPA's entry to property 'unless . . . the demand for entry . . . is arbitrary and capricious . . . .'"); United States v. Iron Mountain Mines, Inc., 28 Envt. Rep. Cas. 1454 (BNA) (E.D. Cal. 1987) (review limited to whether EPA's determinations were arbitrary or capricious); United States v. Long, 687 F. Supp. 343 (S.D. Ohio 1987) (same); United States v. Standard Equipment, Inc., 13 Chem. Waste. Lit. Rptr. 261, 262-263 (W.D. Wash. Nov. 3, 1986) (same).

CERCLA's new judicial review provision, Section 113(h), 42 U.S.C. § 9613(h), further reaffirms the limited jurisdiction afforded under Section 104(e). In order to prevent litigation which would delay EPA cleanups, Section 113(h) restricts the court's jurisdiction to review EPA's selection of a remedial action and bars pre-enforcement review of Agency response actions.[7] Representative Glickman explained on the floor of the

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[7]Specifically, Section 113(h) provides that a federal court's jurisdiction to review challenges to response actions may be exercised in only five circumstances:

1) a cost-recovery action under section 107;

2) an action to enforce a cleanup order issued pursuant to section 106(a);

3) an action for reimbursement under section 106(b);

4) a citizen's suit under section 310, 42 U.S.C. § 9659, challenging a response action already completed; and

5) an action under Section 106 to compel a remedial action.

House of Representatives that Congress had site investigations specifically in mind when it added section 113(h) to CERCLA:

> [T]here is to be no review of a removal action when there is to be a remedial action at the site. Thus, for example, review of the adequacy of a remedial investigation and feasibility study, which is a removal action, would not occur until the remedial action itself had been taken.

132 Cong. Rec. H9582 (Oct. 8, 1986) (Statement of Rep. Glickman). See also S. Rep. No. 99-11, 99th Cong., 1st Sess. 58 (1985); H.R. Rep. No. 99-253, 99th Cong. 1st Sess. 81 (1985).

The courts have been careful to heed these congressional directives to limit premature review of EPA's response actions.[8] Accordingly, in Dickerson v. Administrator, 834 F.2d at 977-78, the court held that there could be no preenforcement review of an EPA removal action and, in Alabama v. EPA, 871 F. 2d 1548 (11th Cir. 1989), the court held that the statutory language clearly precluded judicial review of a challenge to remedial action until the "remedial action is actually completed," noting:

> This Court has already recognized that 'the primary purpose of CERCLA is the prompt cleanup of hazardous waste sites.' (Quoting Dickerson v. Administrator, supra).

Id. at 1557-1558. See also South Macomb Disposal Authority v. U.S.E.P.A., 681 F. Supp. 1244, 1251 (E.D. Mich. 1988) ("injunctions [based on constitutional challenges] are precisely

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[8] Even before the enactment of the SARA amendments, a number of courts held that CERCLA's remedial scheme implicitly barred preenforcement review of EPA's response actions. See, e.g., Lone Pine Steering Committee v. U.S.E.P.A., 777 F.2d 882, 886-88 (3d Cir. 1985), cert. denied, 476 U.S. 1115 (1986); J.V. Peters & Co. v. Administrator, EPA, 767 F.2d 263, 264-66 (6th Cir. 1985).

the type of impediment that the preenforcement review [prohibition] was meant to prohibit"); United States v. Fisher, 864 F.2d 434, 437 (7th Cir. 1988); United States v. Charles George Trucking Co., 682 F. Supp. at 1274; United States v. Long, 687 F. Supp. at 344; United States v. Iron Mountain Mines, 28 Envt. Rep. Cas. at 1454; United States v. Standard Equipment Co., 13 Chem. Waste Lit. Rptr. at 262-63.

Finally, in Section 113(j), 42 U.S.C. § 9613(j), Congress provided that judicial review of EPA's response actions, under the arbitrary and capricious standard, must be limited to the administrative record:

> (1) Limitation.--In any judicial action under this Act, judicial review of any issues concerning the adequacy of any response action taken or ordered by the President shall be limited to the administrative record. Otherwise applicable principles of administrative law shall govern whether any supplemental materials may be considered by the court.
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> (2) Standard.--In considering objections raised in any judicial action under this Act, the court shall uphold the President's decision in selecting the response action unless the objecting party can demonstrate, on the administrative record, that the decision was arbitrary and capricious or otherwise not in accordance with law.

Consistent application of the record review provisions of Section 113 is required by CERCLA's language and legislative history. Section 113(j)(1) and (2) both apply on their face to "any judicial action" under CERCLA, which includes actions for access under section 104(e). United States v. Nicolet, 17 Envtl. L. Rep. 21091, 12092 (E.D. Pa. 1987) (review should be based on

administrative record already in existence). Indeed, in granting EPA its statutory right of access, courts have looked no further than the record facts upon which EPA made its initial determination that there was or may have been a release or threatened release of hazardous substances. See, e.g., United States v. Fisher, 864 F.2d at 438; United States v. Iron Mountain Mines, 28 Envt. Rep. Cas. at 1454; United States v. Long, 687 F. Supp. at 344.[9]

IV. ARGUMENT

EPA seeks access to property which is part of an NPL site where high levels of hazardous substances have been released. These hazardous substances include dicamba and benzonitrile wastes, and hazardous substances associated with these wastes, including 1,4-dichlorobenzene, 2-chlorophenol, and phenol. The purpose of this entry is to define the extent of the contamination on Defendants' property so that an appropriate remedy can be implemented.

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[9] Limiting judicial review to determining whether, based on the administrative record before the court, EPA's determinations on access matters are "arbitrary and capricious," is consistent with general principles of administrative law which hold that informal agency actions must be reviewed on the record, rather than de novo, and under the arbitrary and capricious standard of review. See Camp v. Pitts, 411 U.S. 138, 142 (1973); Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971). See also Florida Power & Light Co. v. Lorion, 470 U.S. 729, 743 (1985). The arbitrary and capricious standard reflects "great deference" to an agency's decision, and mandates judicial affirmance if "a rational basis for the agency's decision is presented" by the administrative record. See Environmental Defense Fund v. Costle, 657 F.2d 275, 283 (D.C. Cir. 1981). See also Bowman Transportation v. Arkansas-Best Freight System, Inc., 419 U.S. 281 (1974).

As discussed fully below, entry is authorized because the minimal requirements stated in Section 104(e) clearly are met. The Court, therefore, should enter an order confirming EPA's access rights during the period of the performance of the RI/FS and any remedial action determined by EPA to be necessary to protect human health and the environment. Further, the Court should enjoin any interference of such access rights. See 42 U.S.C. § 9604(e)(5) (stating that where there has been "interference with entry . . . the Court shall enjoin such interference. . ." and authorizing a civil penalty in the amount of $25,000 for each day of noncompliance with the provisions of Section 104 or an order under Section 104(e)(5)(B)).

A. EPA has a reasonable basis to believe there is or may have been a release or a threatened release of hazardous substances into the environment at the Site.

Section 104(e) directs this Court to enforce EPA's request for access where "there is a reasonable basis to believe there may be a release or threat of release of a hazardous substance . . . ." As a threshold matter, EPA has more than ample reason to believe that there is or may be a release or threatened release of hazardous substances at the site. Congress has defined the terms of the statute liberally in order to effectuate the broad remedial purposes of CERCLA, and practically any conceivable escape of a hazardous substance into the environment is a "release." 42 U.S.C. § 9601(22). See, e.g., New York v. Shore Realty Corp., 759 F. 2d 1032, 1045 (2d Cir. 1985); United

States v. Reilly Tar & Chemical Corp., 546 F. Supp. 1100, 1112 (D. Minn. 1982).

"Release" is defined in pertinent part as:

> any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment . . . ."

42 U.S.C. §9601(22). A "threat of release" is, accordingly, any condition with the potential to result in a release of hazardous substances. "Hazardous substance" is defined to include substances listed as hazardous under section 102 of CERCLA, 42 U.S.C. § 9602, and chemicals identified as hazardous under a number of other federal environmental pollution statutes.[10] Finally, "environment" is defined as including "navigable waters . . . and . . . any other surface water, groundwater, drinking water supply, land surface or subsurface strata, or ambient air within the United States . . . ." 42 U.S.C. § 9601(8).

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[10] Section 101(14) of CERCLA states in pertinent part:

> The term "hazardous substance" means (A) any substance designated pursuant to section 1321(b)(2)(A) of Title 33 [the Federal Water Pollution Control Act ("FWPCA")], (B) any element, compound, mixture, solution, or substance designated pursuant to section 9602 of this title, (C) any hazardous waste having the characteristics identified under or listed pursuant to section 3001 of the Solid Waste Disposal Act (but not including any waste at the regulation of which under the Solid Waste Disposal Act has been suspended by Act of Congress), (D) and toxic pollutant listed under section 1317(a) of Title 33 [section 307(a) of the FWPCA], (E) any hazardous air pollutant listed under section 112 of the Clean Air Act, and (F) any imminently hazardous chemical substance or mixture with respect to which the Administrator has taken action pursuant to section 2606 of Title 15 [Toxic Substances Control Act].

EPA has published a comprehensive list of CERCLA hazardous substances, codified at 40 C.F.R. § 302.4.

Here, as a result of chemical sampling and analyses, high levels of dicamba by-products and benzonitrile waste have been detected in the soils at the Site. These wastes are hazardous substances as defined by Section 101(14) of CERCLA, 42 U.C.S. §9601(14), and are listed as hazardous substances pursuant to Section 102(a) of CERCLA, 42 U.S.C. §9602(a), at 40 C.F.R. §302.4.[11] Their presence in the soils, surface water and ground water at the Site conclusively demonstrate that there has been a "release" into the "environment" as defined by Section 101(8) and (22) of CERCLA, 42 U.S.C. § 9601(8) and (22). See, e.g., United States v. Bliss, 667 F. Supp. 1298, 1305 (E.D. Mo. 1987); United States v. Conservation Chemical Co., 619 F. Supp. 162, 182-83 (W.D. Mo. 1985); United States v. Wade, 577 F. Supp. 1326, 1334 (E.D. Pa. 1983).

The evidence contained in the administrative record supporting EPA's finding of a release or threatened release amply satisfies the showing that the arbitrary and capricious standard requires. (Exhibit 12.) The administrative record contains reports of site visits and sampling results, which show actual releases of hazardous substances at the Site. (See, e.g., Attachment A to Exhibit 12, Hazard Ranking System scoring package, p. 16; Attachment B to Exhibit 12, NUS Corporation

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[11] 1,4-dichlorobenzene, 2-chlorophenol, and phenol which are associated with dicamba and benzonitrile wastes and which were found by EPA at the Site, are also listed as hazardous substances pursuant to Section 102(a) of CERCLA, 42 U.S.C. §9602(a), at 40 C.F.R. §302.4.

Report, July 17, 1986, pp. 14-20; Attachment E to Exhibit 12, Site Inspection Report, p. 2).

Furthermore, pursuant to Section 105 of CERCLA, EPA evaluated the information regarding releases and threatened releases at the Site in accordance with the procedures promulgated at 40 C.F.R. §300.66 ("the Hazard Ranking System"), and as a result of this evaluation, proposed that the Site be listed on the National Priorities List ("NPL").[12] 52 Fed. Reg. 2492 (January 22, 1987). After the close of a substantial public comment period, the Site was listed on the National Priorities List as part of a final rule. 54 Fed. Reg. 13296, 13316 (March 31, 1989). EPA's evaluation and listing of the Site on the NPL "amply satis[fies]" the statutory standard for access. United States v. Fisher, 864 F.2d at 438.

Thus, the facts contained in the administrative record far exceed the showing that plaintiff must make to demonstrate that EPA has not been arbitrary or capricious in making a finding that there has been a release of hazardous substances at the Site and in determining on that basis that entry on the Defendants' property is necessary.

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[12] As noted above, the NPL, promulgated at 40 C.F.R. Part 300, App. B, lists those sites nationwide at which releases or threatened releases of hazardous substances are found to present the greatest threats to the public health and the environment. 42 U.S.C. § 9605(a)(8). These sites are identified through the application of promulgated procedures called the Hazard Ranking System. 40 C.F.R. § 300.66; 40 C.F.R. Part 300, App. A.

B. The purposes for which EPA seeks access to Defendants' property are clearly authorized by CERCLA: (1) conducting sampling to fully characterize contamination at and near the Site so as to determine the scope of the remedial response action needed to protect human health and the environment; and (2) performing such remedial response.

Section 104(e)(1) of CERCLA authorizes the President or any duly delegated representative[11] to exercise the access authority of Section 104(e) for the broad purposes "of determining the need for response, or choosing or taking any response action under [CERCLA], or otherwise enforcing the provisions of [CERCLA]." 42 U.S.C. § 9604(e)(1). In a series of definitional paragraphs in Section 101 of CERCLA, Congress made it clear that "response" or response actions include virtually any activity associated with the investigation and clean-up of hazardous waste sites. Specifically, CERCLA defines "response" to mean "remove, removal, remedy, and remedial action. . . ." 42 U.S.C. § 9601(25). "Removal" actions are typically short-term, temporary or interim response actions to prevent damage to public health or the environment. Removal actions include "such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances . . . ." 42 U.S.C. § 9601(23).[12] Investigation and sampling conducted pursuant to a

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[11] The President has delegated his authority under section 104 to EPA. Exec. Order No. 12580, sec. 2(g) and (i), 52 Fed. Reg. 2923, 2925 (1987) (delegates investigatory, response, and entry authority with regard to non-federal facilities).

[12] Section 101(23) of CERCLA states in pertinent part:

(continued...)

Remedial Investigation or Feasibility Study are removal actions within the meaning of CERCLA. See 42 U.S.C. §§ 9601(23) and 9604(b). "Remedial" actions refer to response actions taken consistent with a permanent remedy. Remedial actions include "actions . . . to prevent or minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment. . . ." 42 U.S.C. § 9601(24).[13] Investigation and

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[12](...continued)
The term "remove" or "removal" means the cleanup or removal of released hazardous substances from the environment, such actions as may be necessary [sic] taken in the event of the threat of release of hazardous substances into the environment, such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances, the disposal of removed material, or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment which may otherwise result from a release or threat of release.

42 U.S.C. § 9601(23).

[13] Section 101(24) of CERCLA states in pertinent part:

The term "remedy or remedial action" means those actions consistent with permanent remedy taken instead of or in addition to removal actions in the event of a release or threatened release of a hazardous substance into the environment, to prevent or minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment. The term includes, but is not limited to, such actions at the location of the release as storage, confinement, perimeter protection using dikes, trenches, or ditches, clay cover, neutralization, cleanup of released hazardous substances or contaminated materials, recycling or reuse, diversion, destruction, segregation of reactive wastes, dredging or excavations, repair or replacement of leaking containers, collection of leachate and runoff, onsite treatment or incineration, provision of alternative water supplies, and any monitoring reasonably required to
(continued...)

sampling are routinely necessary to determine the need for remedial action. See 40 C.F.R. § 300.68 (regulations promulgated pursuant to Section 105(a) of CERCLA, 42 U.S.C. § 9605(a), governing remedial investigations).

Section 104(e)(1) of CERCLA lists "determining the need for response or choosing or taking any response action" as purposes for which EPA and its representatives are authorized to enter property. Further, Section 104(e)(4) of CERCLA expressly authorizes EPA inspections and sampling. The additional sampling activities for which EPA is seeking access are response activities directed precisely at determining the scope of the remedial action necessary at the Site. Clearly, performing the remedial action selected for the Site will constitute "taking any response action."[14]

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[13](...continued)
assure that such actions protect the public health and welfare and the environment.

42 U.S.C. § 9601(24).

[14] Courts have ordered access for a wide variety of response activities. See, e.g., United States v. Dickerson, 660 F.Supp 227 (M.D. Ga.) aff'd 834 F.2d 974 (11th Cir. 1987) (access granted to EPA for purposes of investigating, monitoring, sampling and conducting remedial action at drum storage site); United States v. Stanley Sondey, 88-2955 HAA (D.N.J. August 10, 1988) (order granting access to EPA and its representatives to determine the need for, choose and conduct response activities); and other cases cited at pp. 8-9 herein.

C. The Defendants' property falls within the categories of property which EPA and its representatives are authorized to enter.

Once EPA determines that grounds exist for entry, its rights to entry and access are far reaching. Section 104(e)(3) authorizes EPA and its representatives to enter "[a]ny . . . facility, establishment, or other place or property where any hazardous substance or pollutant or contaminant may be or has been generated, stored, treated, disposed of, or transported from[,] . . . released[,] . . . or . . . where such release is or may be threatened [,] . . . [or] where entry is needed to determine the need for response or the appropriate response or to effectuate a response action under this title." 42 U.S.C. § 9604(e)(3).[15] Further, Section 104(e)(1) authorizes entry on

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[15] Section 104(e)(3) of CERCLA states as follows:

(3) Entry.--Any officer, employee, or representative described in paragraph (1) is authorized to enter at reasonable times any of the following:

(A) Any vessel, facility, establishment, or other place or property where any hazardous substance or pollutant or contaminant may be or has been generated, stored, treated, disposed of, or transported from.

(B) Any vessel, facility, establishment, or other place or property from which or to which a hazardous substance or pollutant or contaminant has been or may have been released.

(C) Any vessel, facility, establishment, or other place or property where such release is or may be threatened.

(D) Any vessel, facility, establishment, or other place or property where entry is needed to determine the need for response or the appropriate response or to effectuate a response action under this title.

42 U.S.C. § 9604(e)(3).

any property adjacent to those properties specified in section 104(e)(3).

Section 104(e)(3) of CERCLA thus authorizes entry to four overlapping categories of property: (A) properties where hazardous substances may have been generated, stored, treated, disposed of, or transported from; (B) properties from or to which a hazardous substance has or may have been released; (C) properties where a release is threatened; or (D) properties where entry is necessary to determine the need for response action and the nature of the action required, or to effectuate a response action. Entry is also authorized to any property adjacent to those properties enumerated above, under Section 104(e)(1).

The South Marble Top Road Landfill Site falls within all four of the categories of property specified in section 104(e)(3). First, EPA has determined that hazardous substances have been disposed of at the Site. (Administrative Order at p. 3, Exhibit 2; Administrative Record, Exhibit 12). Second, as demonstrated above, EPA's investigation has shown that hazardous substances have been released on the property and that there is a threat of further release. (54 Fed. Reg. 13296, 13316, March 31, 1989; Administrative Order at p. 3, Exhibit 2; Administrative Record, Exhibit 12). Finally, the Site is property which must be entered to determine the need for response action and to take such response action. Accordingly, the Site clearly qualifies under subparagraphs (A), (B), (C) and (D) of Section 104(e)(3) as property where entry is authorized.

CONCLUSION

For the reasons set forth above, the United States respectfully requests this Court to grant its motion and order Defendants to grant EPA and its representatives access to the property and enjoin Defendants from interfering with sampling, investigatory, and remedial activities to be conducted on the property.

Respectfully submitted,

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